Supreme Court, U.S.
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United States

October Term, 1993

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SUPREME COURT, U.S.

DENNIS MARK, *et al.*,
Cross-Petitioners,

vs.

MICHELLE CORWIN, *et al.*,
Cross-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR CERTIORARI

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QUESTIONS PRESENTED:

Did *Renne* v. *Geary* 501 US 312 significantly increase plaintiffs' burden to prove justiciability or redressability, or significantly reduce listener standing? If so, how?

Specifically:

(a) To challenge a censorship law, must plaintiffs show that the relief sought would "completely" redress the injury, and that there are no other laws that could possibly be used to cause the same injury?

(b) Do readers have standing to challenge election laws specifically authorizing censorship of statements in voter pamphlets, if the laws have been used to delete information, comments and opinions on many recent occasions?

(c) Do speakers present a justiciable controversy in challenging laws authorizing censorship of voter pamphlet statements if no proceeding against them under those laws was pending when they filed their suit but such proceedings were initiated while it was pending in the district court?

(The first of these is directly related to the first Question proposed by Cross-respondents in their petition for *cert.*

(The others involve other applications of *Renne* in the same *en banc* decision.

(Cross-petitioners support grant of *cert.* on petitioners' first Question if, but only if, in combination with the above.

(Cross-petitioners oppose granting *cert.* on petitioners' second and third Questions.)

LIST OF ALL PARTIES:

This case is the consolidation of related cases *Geary et al. v. Renne et al.* and *Mark et al. v. Corwin et al.*

Cross-petitioners Dennis Mark, Bob Geary, Robert Silvestri, Max Woods, Alexa Smith, Terence Faulkner, Melissa Gundrun, Wayne Johnson, David Soule, Peter Johnson, Robert Gebert and Sudi Trippet are residents and registered voters of the City and County of San Francisco.

Cross-petitioner Election Action is an association of San Francisco residents and voters.

Cross-respondents: Michelle Corwin was San Francisco Registrar of Voters when *Mark v. Corwin* was filed; Jay Patterson was San Francisco Registrar of Voters when *Geary v. Renne* was filed; Louise Renne is San Francisco City Attorney; Dianne Feinstein was Mayor of San Francisco when *Geary v. Renne* was filed.

Cross-respondent San Francisco Board of Supervisors is the governing body of the City and County of San Francisco.

Cross-respondent City and County of San Francisco is a municipal corporation and a political subdivision of the State of California, responsible for conducting federal, state and local elections within its jurisdiction.

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TABLE OF AUTHORITIES:

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Democratic Comm. v. Eu (1987: 9th) 826 F2d 814: 7
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Geary v. Renne I (1990: 9th) 914 F2d 1249: 1
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Kleindienst v. Mandel (1972) 408 US 753: 7
Lamont v. Postmaster Genl. (1965) 381 US 301: 7
Matthews v. Diaz (1976) 426 US 67: 11
Patterson v. Bd. of Sups. (1988) 202 Cal App 3d 22: 9
Poe v. Ullman (1961) 367 US 497: 8
Renne v. Geary (1991) 501 US 312, 111 SCt 2331: *passim*.
SEIU v. FPPC (1992: 9th) 955 F2d 1312: 7
Va. Pharm. Bd. v. Va. Cons. Cl. (1976) 425 US 748: 7

California State Constitution §6(b): *passim*.

California Elections Code §§ 3795, 5025: *passim*.
California Elections Code §§ 10012, 10013.5: *passim*.

CROSS-PETITION FOR WRIT OF *CERT.*:

Cross-petitioners Dennis Mark *et al.* respectfully pray that a writ of *certiorari* be issued to review the judgment and opinion of the U. S. Court of Appeals for the Ninth Circuit, *en banc*, entered in the above-entitled proceeding.

OPINIONS BELOW:

The opinion of the District Court is unreported and is reprinted as City's Appendix D.* The initial decision of a panel of the Court of Appeals is reported as *Geary v. Renne* (9th Cir. 1990) 914 F2d 1249, and reprinted as City's Appendix B. The order of the Ninth Circuit granting re-hearing *en banc* is reported as *Geary v. Renne* (9th Cir. 1991) 924 F2d 175 and reprinted as City's Appendix C. The decision of the Ninth Circuit sitting *en banc* is reported as *Geary v. Renne* (9th Cir. 1993) 2 F3d 989 and reprinted as City's Appendix A.

JURISDICTION OF THE SUPREME COURT:

The judgment of the Court of Appeals (City's Appendix A) was originally filed September 1, 1993. Both Cross-petitioners and Cross-respondents petitioned for re-hearing and re-hearing *en banc* on or prior to September 15, 1993. Re-hearing and re-hearing *en banc* were denied on December 16, 1993. This Court has jurisdiction to review the judgment by writ of *certiorari* under 28 USC 1254. Cross-petitioners expressly rely upon Rule 12.3 of the rules of this Court in filing this cross-petition. Cross-petitioners received the petition for *cert.* filed by cross-respondents on March 18, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Relevant parts of California Elections Code §10012 are reprinted at p 2 of Cross-respondents' petition for *cert.* Relevant parts of California Elections Code §10013.5 are reprinted at p 3 of Cross-respondents' petition for *cert.* The First Amendment is reprinted at p 4 of Cross-respondents' petition for *cert.*

---

* All references to "City's Appendix" refer to the appendix printed with cross-respondents' petition for *cert.* filed about March 18, 1994.

California Elections Code §3795 reads in relevant part:

> ....During the 10-calendar-day examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the clerk...may seek a writ of mandate or an injunction requiring any or all such materials to be amended or deleted.
>
> A peremptory writ of mandate or an injunction shall be issued only upon clear and convincing proof that the material in question is false, misleading or inconsistent with the requirements of this chapter, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials...

California Elections Code §5025 reads in relevant part:

> During the 10-calendar-day examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the clerk...may seek a writ of mandate or an injunction requiring any or all of the material to be amended or deleted.
>
> A peremptory writ of mandate or an injunction shall be issued only upon clear and convincing proof that the material in question is false, misleading or inconsistent with the requirements of this chapter, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials....

STATEMENT OF THE CASE:

On September 11, 1987, Cross-petitioners Bob Geary, Robert Silvestri, Dennis Mark, Melissa Gundrun, Wayne Johnson, David Soule, Peter Johnson, Robert Gebert, Election Action, Terence Faulkner and Sudi Trippet filed suit against Cross-respondents Louise Renne, Jay Patterson, Board of Supervisors, Dianne Feinstein and City and County of San Francisco, in the Northern District of California, pursuant to 42 USC 1983. This action will be referred to hereafter as the *Geary* action.

The complaint in *Geary* contained three causes of action, one of which was before this Court in *Renne v. Geary* (1991) 501 US 312. Only the First Cause of Action is pertinent here. In said cause of action Cross-petitioners sought declaratory and injunctive relief against enforcement by

Cross-respondents of California Elections Code §§ 3795 and 5025, which authorize judicial proceedings to censor ballot arguments submitted for publication in the official voter pamphlet distributed to all San Francisco voters. Cross-petitioners' ¶17 specifically claimed that threatened enforcement of said statutes would abridge their rights as voters to read the voter pamphlet in uncensored form, in violation of the First and Fourteenth Amendments. (See *Geary* Complaint, the relevant parts of which are reprinted in the Appendix to this Cross-petition, at 1-A.)

On August 30, 1988, Cross-petitioners Dennis Mark, Robert Silvestri, Bob Geary, Terence Faulkner, Max Woods and Alexa Smith filed a second action in the same district court against Cross-respondents Michelle Corwin, Louise Renne and City and County of San Francisco, pursuant to 42 USC 1983. This action will be referred to hereafter as the *Mark* action.

The *Mark* complaint had two causes of action. The First Cause of Action challenged California Elections Code §10012 authorizing administrative censorship of candidate statements submitted for publication in the voter pamphlet, as inconsistent with the First and Fourteenth Amendments. The Second Cause of Action challenged California Elections Code §10013.5 authorizing judicial censorship of candidate statements submitted for publication in the voter pamphlet as inconsistent with the First and Fourteenth Amendments. Cross-petitioners specifically claimed that the threatened enforcement of said statutes would abridge their right as voters to read the pamphlet in uncensored form. City's Appendix E, pp 5 and 6, ¶¶ 16 and 19.

The District Court considered the two cases related and issued a single consolidated order and judgment on both, granting Cross-petitioners' requests for injunctive and declaratory relief against enforcement of California Elections Code §§ 3795, 5025 and 10013.5 in part and against 10012 in entirety. City's Appendix D.

Both sides appealed, and the *Geary* and *Mark* cases were consolidated by the Ninth Circuit for purposes of appeal. The initial panel decision reversed the district court insofar as it had ruled for Cross-petitioners on the merits. City's Appendix B. Cross-petitioners then sought rehearing *en banc* by the Ninth Circuit, which was granted on January 30, 1991. City's Appendix C.

Upon rehearing the consolidated cases *en banc* the Ninth Circuit disposed of Cross-petitioners' claims concerning California Elections Code §§ 3795, 5028 and 10013.5 in a single sentence which simply ordered said claims "remanded with instructions to dismiss without prejudice for lack of a justiciable controversy." City's Appendix A p 3. No further reasons were given save a citation to this Court's decision in *Renne v. Geary* 501 US 312.

REASONS FOR GRANTING THE WRIT:

The Petition for *Cert.* begins its first Question by asking: **"Whether the Ninth Circuit *en banc* court violated principles of federal jurisdiction laid down by this Court in the related case of *Renne v. Geary*..."**

Were any "principles of federal jurisdiction" laid down in *Renne*? If so, the *en banc* court seems mystified; see the parts of the hearing transcribed in City's Appendix, and the part attached to this Cross-petition, at 8,9-A, where one judge says that in the *Renne* opinion, the Supreme Court **"made noises which I find difficult to decipher..."**

Renne exemplifies the confusion that can result when a court rules on an unlitigated issue. Cross-respondents hope *Renne* turns out to be a major precedent making it harder to challenge censorship with federal lawsuits; they hope it will help shield them from litigation on the merits as to constitutional complaints. The dissenters in *Renne* also viewed it as a radical break from precedent, though they aren't so eager for the change. But the *Renne* majority in no way seemed to think it was making a major break from the past. Such a change ought not be made without clarity. And, if no big change was really meant, that <u>also</u> needs clarification.

DID *RENNE* CHANGE JUSTICIABILITY PRINCIPLES?

If this Court doesn't speak for itself on this issue, others will speak for it. At City's Appendix I-24 we can see how Petitioners would like to do this:

> **Judge Rymer, you said you had trouble understanding what the Supreme Court case in *Renne* v. *Geary* was saying. Frankly, I think there are two messages. One message is: *"Every doubt is resolved against justiciability."* If you look at the language that the Court uses, they say, *"There is reason to doubt...."***

> ...the second message is, in a forum case like this, in a voter pamphlet case like this, they want a speaker. They don't want listeners, they want a speaker.

Cross-petitioners would prefer to construe *Renne* as based on its unusual facts, not as an announcement of new rules. In *Renne* there was unusually little evidence that the law in dispute (§6(b) of the California constitution) was causing or likely to cause any would-be listener to miss any information. *Renne* may be something of a new precedent in requiring would-be listeners to show more than a speculative peril of blocked communication. But *Renne* only brings in doubt whether listener-standing exists when there is little or no evidence of the existence of any speaker who is blocked from communicating. The present case, though related to *Renne*, involves the opposite situation; the laws challenged here are routinely used to delete parts of ballot-argument and candidate statements from voter pamphlets.

Renne held that that issue wasn't yet "ripe" - *i.e.*, it was <u>*too soon*</u> to judge §6(b) until it was more than a hypothetical problem. Censorship laws which have long been on the books and been used on innumerable occasions, as here, are the opposite case from an endorsement ban with no enforcement mechanism and not even one solid example of blocked communication firmly attributable to it.

It is somewhat dangerous to say that censorship laws are okay as long as they're ineffective. When they *are* effective, will we *know*? And where is the line to be drawn, if not at "zero tolerance"? But the Supreme Court's willingness to put up with supposedly-harmless bans on political parties voicing opinions on issues of concern to them such as non-partisan elections, cannot in all fairness be taken as willingness to also permit such bans when they result in someone actually deleting words from someone else's speech.

The obvious problem with a case-by-case determination whether those who complain of censorship have standing to do so, is that fewer cases will be decided on the merits, and instead of being decided on principles such as whether people have the right to make their own decisions as to which propaganda is "false" or "misleading", they get decided based on collateral matters like whether members of a party county-committee have standing to complain that the committee is barred from endorsing candidates. If the Court did not intend this result, it should make itself more clear.

A: TO CHALLENGE A CENSORSHIP LAW, MUST PLAINTIFFS SHOW THE RELIEF WOULD "COMPLETELY" REDRESS THE INJURY, AND THAT NO OTHER LAW EXISTS THAT COULD BE USED TO THE SAME EFFECT?

A central feature of the present case is the theory that the existence of unchallenged, overlapping laws means that the partial remedy of voiding only some of them would be less-than-complete redress and therefore no redress at all. This is so counter-intuitive that it would probably not be argued were it not for *Renne*'s apparent holding to that effect. According to the Petition for *Cert.* p 13, the *Renne* Court found the injury due to §6(b) to be non-redressable: "[b]ecause the complaint sought such incomplete relief..." To encourage us to seek more complete relief, at p 16-17 they give a survey of the laws we are to challenge, some of which we might well have neglected; they make a point at fn 16 to report that the state supreme court has upheld use of Code of Civil Procedure §1060, the generic declaratory judgment statute, to the same effect.

But does anyone really believe it would have been better if we had included §1060 in our challenge? The only reason given (other than *Renne*'s authority) is to assure that federal courts not consider challenges to state laws except when necessary (*id.*, p 13). But the effect of this rule is to pressure plaintiffs to overplead and challenge laws unnecessarily, so it hardly serves its own stated purpose.

Cross-petitioners hope the Court will take this chance to explain that it only held overlapping laws *sometimes* defeat redressability, not that they *generally* do. Petitioners want the Court to go the opposite direction (*id.*, emph. added):

> A complainant lacks standing when "[t]here is reason to <u>*doubt*</u>" that the relief requested will redress the injury alleged in the complaint. *Renne v. Geary*, 111 SCt at 2337-2338....
>
> In this case, the same situation exists as in *Renne*. The complainants have failed to meet their burden of showing that the relief sought, even if granted, would <u>*completely*</u> redress the injury alleged.

The Court's silence may be taken as an implicit admission that this is the new rule. But the Court never said that an injury is nonredressable <u>*whenever*</u> there are any doubts that the remedy will be effective or <u>*whenever*</u> it would be less-than-complete redress. The Court should make this clear.

(B) DO READERS HAVE STANDING TO CHALLENGE ELECTION LAWS SPECIFICALLY AUTHORIZING CENSORSHIP OF VOTER PAMPHLET STATEMENTS IF THE LAWS HAVE BEEN USED ON NUMEROUS OCCASIONS?

Prior to the decision of this Court in *Renne v. Geary, supra*, there was no question but that would-be listeners or readers of speech and press have standing to challenge restrictions that may lead to censorship or suppression of the speech *even in the absence of an actual would-be speaker* as a co-plaintiff. See *Virginia Pharmacy Board v. Virginia Consumer Council* (1976) 425 US 748, 757 (action by consumers of prescription drugs to challenge ban on advertising of prescription drug prices held to be justiciable despite absence of pharmacist as party); *Kleindienst v. Mandel* (1972) 408 US 753, 759-60, 762-4 (as would-be listeners to his speeches, university professors had standing to challenge exclusion of socialist professor from U.S. on account of his "subversive" views); *Lamont v. Postmaster General* (1965) 381 US 301 (would-be recipients of publications from Communist countries had standing to challenge law permitting postal authorities to refrain from delivering "communist propaganda" unless would-be recipient requested delivery in writing); *Democratic Committee v. Eu* (9th Cir. 1987) 826 F2d 814, 824 (individual party members had standing to challenge endorsement ban "as an infringement of their First Amendment right to listen.")

There was also no question that election laws abridging First Amendment rights could be challenged despite total absence of any past record of enforcement, because of the inherently chilling effect of such laws on protected speech. See *Buckley v. Valeo* (1976) 424 US 1 (plaintiffs allowed to challenge election laws that had not yet taken effect); *Eu v. Democratic Committee* (1989) 489 US 214 (challenged laws had been on books for over 20 years but never enforced); *SEIU v. FPPC* (9th Cir. 1992) 955 F2d 1312 (new laws challenged before they could be enforced against anyone); see also *Epperson v. Arkansas* (1968) 393 US 97, 101-2 (justiciable controversy found to exist in challenge to anti-evolution statute that had been on books for 40 years but never enforced). These First Amendment cases are in clear contrast to many cases, like the contraceptives ban in *Poe v. Ullman* (1961) 367 US 497, involving unenforced laws which lacked chilling effect on protected speech.

In *Babbitt v. Farm Workers* (1979) 442 US 289, 300 fn 12, this Court recognized that an especially liberal standard of justiciability should exist with respect to challenges to election laws (emphasis added):

> Challengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment....Justiciability in such cases depends not so much on the fact of past injury *but on the prospect of its occurrence in an impending or future election*....There is a value in adjudicating election challenges notwithstanding the lapse of a particular election because "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held."...

The decision of this Court in *Renne* has sowed doubt in the lower courts as to whether the foregoing principles are still generally applicable.

Did *Renne* hold merely that a remote and speculative peril of redressable loss of information is insufficient to show listener standing?

Or was *Renne* intended to upend constitutional jurisprudence and overrule numerous past decisions of this court, *sub silento?*

In the instant case, voters claiming the right to read an uncensored voter pamphlet challenged statutes authorizing judicial censorship of ballot-argument and candidate statements under §§ 3795, 5025 and 10013.5. Neither the District Court nor the three-judge panel doubted justiciability, but the *en banc* court dismissed these challenges for lack of a justiciable controversy, giving no explanation beyond a citation to this Court's *Renne* decision.

The *en banc* court apparently ignored these distinctions:

(1) *Renne* dealt with §6(b), a state constitutional clause which had only recently been enacted, and had no apparent enforcement mechanism and no history or imminent future of being used to prevent any speech which couldn't in any case be prevented by other means. By contrast, the three

censorship statutes contain clear enforcement mechanisms which have been used to censor statements on numerous occasions; see Appendix, *Geary* Complaint p 3-A, *En banc* transcript p 10-A, City's Appendix E p 6-7, ¶¶ 20-22.

Ripeness is far more clear here than in *Babbitt v Farm Workers* (1979) 442 US 289, 302, where this Court held that a suit by a labor organization to challenge a state law allowing an administrative agency to issue "cease and desist" orders and courts to issue injunctions against certain forms of "dishonest, untruthful or deceptive" publicity concerning labor disputes, was justiciable although the statute had *never* actually been violated or enforced:

> **We think that the prospect of issuance of an administrative cease-and-desist order...or a court-ordered injunction...against such prohibited conduct provides substantial...support for the conclusion that appellees' challenge to the publicity provision is justiciable.** *(id.)*

Since the *en banc* ruling was unexplained, we can only suppose that the finding of lack of a justiciable controversy included a rejection of listener standing; no other possible ground would be expressed by citation to *Renne*.

The Court should grant *cert.* to clarify whether *Renne* intended to deny listener standing only where based on a mere speculative peril of censorship, or even in cases where censorship has occurred many times, as here.

(2) §6(b) has yet to be subject of a reported case in the state court system; therefore it may be premature to say how it will be construed. But the state courts have had ample opportunity to construe §§ 3795, 5025 and 10013.5. After having had ten years to review the matter, the state courts have given such a sweeping interpretation to §§ 3795 and 5025 that even the initial panel decision of the Ninth Circuit questioned the constitutionality of such construction. See *Patterson v. Bd. of Supervisors* (1988) 202 CA3d 22, 29, holding that these statutes authorize deletion of any material in a ballot argument "not clearly germane to [the] ballot proposition", which the *en banc* court found so overbroad it felt obliged to construe the state appeals court to mean "clearly *not* germane". City's Appendix B p 12 fn 1.

As for § 10013.5, there were two published cases but no longer are any, because the California Supreme Court has twice granted review to appellate decisions construing the

statute, then dismissed the cases and de-published them; see actions of California Supreme Court depublishing *Callignan v. Superior Court* and *Drexel v. Mann*.

(3) In *Renne*, this Court found a redressability problem because invalidating §6(b)'s ban on parties endorsing candidates in non-partisan elections would leave the city free to delete party endorsements from candidate statements under authority of §10012's subject-matter controls (which might be valid even if §6(b) isn't).

Here, no similar problem exists. Cross-petitioners know of no other provision of law but §§ 3795, 5025 and 10013.5 that can be utilized to censor ballot-argument or candidate statements to delete material which has been officially found to be "not clearly germane", "clearly not germane", "false", "misleading" or otherwise officially disfavored.

(C) DO SPEAKERS PRESENT A JUSTICIABLE CONTROVERSY IN CHALLENGING CENSORSHIP LAWS IF A PROCEEDING UNDER THOSE LAWS WAS FILED AGAINST THEM SOON AFTER THEY FILED SUIT?

The *en banc* court's unexplained finding of non-justiciability must also have included rejection of would-be-speaker standing for Cross-petitioners Trippet and Election Action. This apparently would have been based on the city's theory that these speakers lacked standing since there was not a censorship proceeding in process against them when the federal complaint was filed, although such a proceeding did occur seven months later, while the case was pending in the District Court. See 10-A, *infra*, Clerk's Record 42, 44, 124; Appellee's E.R. 141; Motion for Judicial Notice (filed with 9th Circuit on 7/2/1993). The *en banc* citation of *Renne* implies that the court construed it to deny ripeness to speakers until censorship is pending or impending.

In the District Court no issue was raised of justiciability as to plaintiffs who did not have censorship attempts pending when the complaint was filed, since the pre-*Renne* understanding had been that would-be speakers could complain of censorship statutes without waiting for their first adverse encounter.

Speakers should not have to experience their first censorship or attempted censorship, or have such an attempt pending or imminent, before being able to call on the federal courts for protection from a perceived chilling effect.

Renne did not involve would-be speakers (since the committee-members were not found to have standing to litigate the committee's rights) but the *en banc* court has apparently construed *Renne* to deny standing to speaker as well as listener, absent pending or imminent censorship.

But even if these speakers lacked standing when they filed their complaint in September 1987, they certainly had it by April 1988 when their ballot-argument statements were subjected to censorship proceedings; had anyone seen any need for it, a supplemental pleading could and would have been filed while the case was pending.

But the *en banc* court apparently accepted the city's highly formalistic argument that these Cross-petitioners had to have standing including a ripe controversy when the suit was filed, and that later events giving them standing cannot be considered or even brought to the court's attention by supplemental complaint.

That view conflicts with *Matthews v. Diaz* (1976) 426 US 67, 76, fn 5 (emphasis added, footnotes deleted):

> We have little difficulty with Espinosa's failure to file an application with the Secretary until *after* he was joined in the action. Although...filing of an application [is] a nonwaivable condition of jurisdiction..., Espinosa satisfied this condition *while the case was pending in the District Court.*
>
> *A supplemental complaint in the District Court would have eliminated this jurisdictional issue;* since the record discloses, both by affidavit and stipulation, that the jurisdictional condition wa satisfied, *it is not too late, even now, to supplement the complaint to allege this fact.* Under the circumstances, we treat the pleadings as supplemented by the Secretary's stipulation that Espinosa had filed an application.
>
> ....
>
> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 USC §1653....*Although the defect in Espinosa's allegation must be cured by supplemental pleading, instead of amended pleading, the statutory purpose of avoiding needless sacrifice to defective pleading applies equally to this case....*

Since "the record discloses" that Trippet and Election Action *did* have statements subjected to censorship proceed-

ings under authority of §§ 3795 and 5025 during the course of this litigation, the Ninth Circuit was duty-bound to "treat the pleadings as supplemented by" the judicially noticeable materials it was asked to judicially notice by these Cross-petitioners, and to dispose of their claims on the merits.

Cert. should be granted to clarify whether *Renne* is to be understood to deny standing to would-be-speakers unless they can show pending or impending censorship; and if so, whether they may still make that showing by supplemental pleading if censorship proceedings are initiated against them while the complaint is pending.

CONCLUSION:

Renne was seen by its dissenters as a radical change in justiciability standards, and the majority failed to dispel that impression.

Cert. should be granted to allow the Court to clarify how much *Renne* changed, if anything.

Is redressability found inadequate merely because less-than-complete? Do plaintiffs have to show that there aren't any other laws that can be used to cause the same injury as the challenged law?

Does *Renne* deny listener standing only when censorship is a remote and speculative peril, or also when censorship has occurred on numerous recent occasions?

Does *Renne* deny speakers standing unless censorship is pending or impending at the time of their complaint? If so, can they use supplemental pleading to inform the court that they now have standing?

To answer these, the Court should grant *Cert.* on the combination of the above questions and the first Question proposed by Cross-respondents' petition for *cert.*

Respectfully submitted, April 17, 1994.

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in pro. per.

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UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

BOB GEARY, ROBERT SILVESTRI, DENNIS MARK, MELISSA GUNDRUN, WAYNE JOHNSON, DAVID SOULE, MAX WOODS, PETER JOHNSON, ROBERT GEBERT, ELECTION ACTION, TERENCE FAULKNER and SUDI TRIPPET,

Plaintiffs,

vs.

LOUISE RENNE, San Francisco City Attorny; DIANNE FEINSTEIN, San Francisco Mayor; BOARD OF SUPERVISORS, City and County of San Francisco; CITY AND COUNTY OF SAN FRANCISCO; and JAY PATTERSON, San Francisco Registrar of Voters,

Defendants.

No. C87-4724

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FOR VIOLATION OF CIVIL RIGHTS

GENERAL ALLEGATIONS:

1. Plaintiffs BOB GEARY, ROBERT SILVESTRI, DENNIS MARK, MELISSA GUNDRUN, WAYNE JOHNSON, DAVID SOULE, MAX WOODS, PETER JOHNSON, ROBERT GEBERT, and TERENCE FAULKNER are residents and registered voters of the City and County of San Francisco (hereafter "City and County").

2. Defendant DIANNA FEINSTEIN is Mayor of the City and County and is sued herein in her official capacity.

3. Defendant LOUISE RENNE is City Attorney of the City and County and is sued herein in her official capacity. As City Attorney Ms. Renne is responsible for representing other officials of the City and County in actions commenced by them.

4. Defendant PATTERSON is Registrar of Voters of the City and County and is sued herein in his official capacity. As Registrar of Voters Patterson is responsible for conducting elections in the City and County, publishing voter information pamphlets issued on behalf of the City and County, and enforcing election laws of the State of California and the City and County of San Francisco.

5. Defendant CITY AND COUNTY OF SAN FRANCISCO is a municipal corporation of the State of California.

6. Defendant BOARD OF SUPERVISORS is the legislative body of the City and County and is sued herein in its official capacity.

7. Plaintiff ELECTION ACTION is an organization dedicated to placing measures on the ballot by initiative, and campaigning for and against ballot propositions.

8. Plaintiff SUDI TRIPPET is coordinator of ELECTION ACTION.

9. In doing all acts alleged herein, defendants have been, or threaten to be, acting under color of state law.

10. In connection with each election, the City and County mails a voters pamphlet to all registered voters. Said pamphlet contains ballot arguments for and against City and County measures, and statements of qualifications of candidates for City and County offices. Defendant Patterson is responsible for preparing said voters pamphlet.

FIRST CAUSE OF ACTION

11. Plaintiffs incorporate by reference each and every allegation of paragraphs 1 through 10.

12. In connection with the June 2, 1987 special municipal election plaintiffs GEARY, SILVESTRI and FAULKNER submitted a number of ballot arguments to defendant PATTERSON for publication in the voters pamphlet. Said arguments were accepted for filing by PATTERSON.

13. In connection with the November 3, 1987 general municipal election, plaintiffs GEARY, FAULKNER, WOODS, SILVESTRI and MARK submitted ballot arguments to defendant PATTERSON for publication in the voters pamphlet. Said arguments were accepted for filing by PATTERSON.

14. Defendants PATTERSON, RENNE and CITY AND COUNTY OF SAN FRANCISCO have claimed and now do claim the right to censor the voters pamphlet pursuant to certain California statutes and city ordinances, including but not limited to Elections Code §§ 3795 and 5025. Pursuant to said state and local laws, said defendants have claimed that they are entitled to obtain injunctions from the California Superior Court to restrain publication of ballot arguments or portions thereof, and writs of mandate having such injunctive effect, to prevent publication of ballot arguments or portions thereeof which contain material considered to be "false", "misleading" or "inconsistent" with Chapters 2 and 3 of Division 7 of the Elections Code.

15. Pursuant to the aforementioned California Elections Code Sections, and other state and local laws, defendants RENNE and PATTERSON have filed actions in the California Superior Court and obtained writs of mandate restraining publication of portions of ballot arguments submitted by plaintiffs GEARY, SILVESTRI, FAULKNER, WOODS and MARK in connection with the June 2, 1987 and November 3, 1987 [elections].

16. Unless restrained by order of this court from doing so, RENNE and PATTERSON threaten to commence further actions in connection with future elections to restrain publication of all or portions of ballot arguments submitted by some or all of plaintiffs.

17. Plaintiffs and each of them have been injured by the conduct of RENNE and PATTERSON in commencing the action described in paragraphs 14 and 15, as registered voters who desire to read ballot arguments in their uncensored form. Plaintiffs and each of them will be injured by the conduct of RENNE and PATTERSON in threatening to commence future actions as alleged in paragraph 16, as reg-

istered voters who desire to read ballot arguments in their uncensored form.

18. An actual controversy now exists in that:

a. Plaintiffs contend that California Elections Code §§ [3795] and 5025 are violative of plaintiff's rights to freedom of speech and freedom of the press under the First and Fourteenth Amendments to the United States Constitution, and 42 USC 1983 and 1985 in that said statutes permit imposition of prior restraints on free expression, permit restraint of constitutionally protected statements of opinion and fact concerning elected officials and public issues, and impose unconstitutionally vague and overbroad standards for expression in a forum opened by the City and County.

b. Defendants allege that RENNE, PATTERSON and CITY AND COUNTY OF SAN FRANCISCO dispute said contentions.

19. Because of the past and threatened conduct of defendants RENNE, PATTERSON and CITY AND COUNTY OF SAN FRANCISCO in seeking court orders in the California Superior Court pursuant to said Election Code §§ [3795] and 5025 of ballot arguments submitted by plaintiffs and others, plaintiffs have suffered and will suffer great and irreparable injury, in that they will be denied their constitutional and civil rights of free speech and free press, and will be subjected to a multiplicity of suits, so that plaintiffs cannot fairly be compensated in damages, and are without any adequate remedy at law. . . .

WHEREFORE, plaintiffs pray for judgment:

1. For a judicial declaration that California Elections Code §§ 3795 and 5025 are unconstitutional and violative of the First and Fourteenth Amendments to the United States Constitution and 42 USC 1983 and 1985. . . .

4. For a temporary restraining order, preliminary injunction and permanent injunction to restrain RENNE, CITY AND COUNTY OF SAN FRANCISCO and PATTERSON from commencing or prosecuting any actions brought pursuant to Elections Code §§ 3795 and 5025. . . .

8. For costs, including reasonable attorney fees.

DATED: 9/8/1987 Arlo Hale Smith, Atty. for Plaintiffs

Terence Faulkner, in pro. per. Sudi Trippet, in pro. per.

EN BANC 6/24/1993 HEARING TRANSCRIPT (EXCERPTS)

. . . .

SMITH: ....Briefly, on the whole justiciability argument, I have two problems with what [Mr. Aftergut] said. As I understand it, the prayer for relief is of great significance only in a default case, which this was not. What happened was, both parties briefed the matter and Judge Zirpoli decided the matter on summary judgment, as if the substantive validity of 10012 was an issue, in terms of references to partisan affiliations and identifications in the voters handbook. However, Judge Zirpoli only reached the method used, i.e., administrative censorship.

And I believe there is no doubt that a party could challenge the administrative censorship as a practice, even if these was an alternative judicial remedy that was, in a certain sense, in doubt. For example, the whole Freedman line of cases, with respect to obscenity, there are remedies such as criminal prosecutions or perhaps even injunctive relief the government could follow. But you can't set up administrative censorship unless they go through certain procedures, which of course would include the government having the burden to go forth and get an injunction first. So I don't see how these could be a justiciability problem with respect to that part of the case, both in view of what Judge Zirpoli did and in view of the state of the record.

The panel claimed that 10012 is enforceable under 10013.5, what's being said now. But clearly the record shows that was not the practice in San Francisco at the time the suit was filed. In fact, there was some 6 years worth of administrative censorship before it finally stopped after the Mark v. Corwin suit was commenced.

COURT: Do you agree that the intent in filing Mark v. Corwin was to reach the administrative censorship issue, and not the substantive validity of 10012?

SMITH: I thought we'd never get to the substantive validity. But frankly, what happened was when they made the summary judgment motion...they defended it on the merits. It was shortly after there'd been a panel decision in the other part of this case, Geary v Renne, upholding the endorsement ban. So they were strongly urging the substantive validity. So I responded on that point. Judge Zirpoli however ended up not even getting to that, because

he said, "I don't have to get to that. There's a problem of use of administrative censorship."

COURT: So we don't have to get to it either, because we don't have a district court decision on the substantive merits of 10012?

SMITH: No, indeed. I only reached the substantive merits because they briefed it and because they were saying that, with respect to the fall-back argument, if the administrative censorship is upheld, then I'm arguing the whole thing is invalid. If this court decided that the administrative censorship was unconstitutional, then you probably wouldn't have to reach it, at this point.

COURT: That would take care of these claims, as you see them, under the record that's brought to us? That is, if we held that administrative censorship under 10012 was properly stricken by the district court, as you view the record, we would have responded to the issues before us dealing with 10012?

SMITH: Exactly, your honor. Because basically what prompted it was we'd had a number of incidents, the most recent one was Mr. Mark's ballot argument being censored in 1988, where in that case some of the material stricken had nothing to do with party affiliation at all.

COURT: If in fact that's what happens, then the only thing that we're left with for the Marks side of the case is whether or not there's proper enforceability under 10013.5. And the opposition says we never get to that issue because it's moot under Renne, the Supreme Court -

SMITH: I want to make some points about...the Renne standing issue. I think the decision Judge Norris wrote in SEIU v. Fair Political Practices Commission 955 Fed 2d 1312...really helps formulate where you go with Renne... and that is Renne does not establish a general principle that if election law has been previously unenforced or was enforced only once in the past, that it can't be challenged. I think it rests on the very unusual problem of the Supreme Court being unsure just who would enforce and... [whether] the state constitutional provisions there would be enforced. Here, we have a statute to fit. The registrar had the enforcement power. It's just like the FPPC in the

SEIU case; the FPPC had enforcement power. If we've got someone who by statute has enforcement power and they express their intent to enforce, and there has been some enforcement (and the record shows there has been), your guidance has to be in cases such as Buckley....I don't think Geary v Renne really creates a justiciability problem. I think if you look at California's decision in Eu v. Democratic Party, where you had all these statutes...that have never been enforced....yet the parties who would be affected had standing. That case and the Buckley case, where Senator Buckley went out and sued the day after the statute passed and two years before any election would even be applicable....

COURT: Counsel, you're going into quite a few other cases but my question was directed at a single case. I don't think anyone's accused the Supreme Court of being clear on its First Amendment analysis. But we have a case, the reverse of one of our cases, which was part of this whole case. And in that case, the city says (and I think you ought to get your best argument why the city is wrong)... if you focus on that particular part of Judge Kennedy's argument, "While the mootness exception for disputes capable of repetition yet evading review has been applied in the election context....that doctrine will not revive a dispute which became moot before the action commenced". The city tells us how the only time the city has used this was two years before the filing of the suit. There may be a good answer to that. What is the answer to that?....

SMITH: I think the best answer to that is the one that Judges Norris and Poole gave, and which Judge Wiggins who dissented on the merits agreed on that point in the SEIU case, and that is the existence of an enforcement authority that intends to regularly enforce an election statute, would create a continuing controversy. Basically, the city registrar of voters has the enforcement authority to go get censorship orders of the voters pamphlet under 10013.5 candidate statements. They have that authority....

COURT: Could you please tell me who the appellees are in these remaining issues? Who are they? Listeners? Voters?

SMITH: I would say appellees are voters and listeners with two qualifications. Of course, Dennis Mark did submit a

candidate statement that did get administratively censored.

COURT: When was that?

SMITH: In 1988.

COURT: Before or after the lawsuit?

SMITH: It was the reason for the lawsuit. In fact, the lawsuit was brought because it was censored in connection with that election. That was brought in September of that year immediately after this happened. With respect to the remaining parties, Ms. Trippet and Election Action, the record at CR 124 and CR 45 clearly reflects that during the pendancy of this lawsuit in 1988, after the lawsuit was brought but before Judge Zirpoli ruled, a censorship action was brought under 3795 and 5025 against ballot arguments that Ms. Trippet and Election Action submitted....

COURT: But that wasn't under 10013.5. That was under the ballot arguments.

SMITH: I thought that the question wasn't restricted just to the candidate statement part of the case, so I answered it more broadly.

COURT: What appellees are left on issues other than 10012? As I understand it, if we affirm the district court on the unconstitutionality of the administrative censorship under 10012, that goes away. That leaves the other sections relative to false and misleading statements and inconsistent statements. Right?

SMITH: Yes.

COURT: Who's left on those issues?

SMITH: With respect to candidate statements as opposed to ballot arguments, I candidly have to say that everyone is a would-be listener.

COURT: No-one's statements have been stricken? No plaintiff has had a statement stricken under 10013.5? Under the other two, yes, but under that one, no?

COURT: On the ballot argument side, which is Geary, if I understand the state of things correctly it is voters who are asserting the injury. In...Renne, the Supreme Court made noises, which I find difficult to decipher, but they

made noises about the need to have those voters and a candidate statement, when it's just a voters-only injury. What is your view of what the Supreme Court said that is pertinent on that point?

SMITH: My view is that since the Supreme Court did not override Kleindienst v. Mandel, Lamont v. Postmaster General or Virginia Consumers Council, since they did not overrule, the language in the majority opinion was not disapproving them, I believe. I think you have to read it as being...in that particular case a redressability problem... Here you're talking about a statute that expressly says the registrar has the authority to bring suits to delete or amend material in the voters handbook in candidate statements. In [Renne] you have the state constitution imposing an endorsement ban. You didn't have an express provision for the city attorney or the registrar to bring suit, although they claimed they did have the authority to do it. No express enforcement mechanism sitting there.

So I think the court was concerned about, how is this kind of dispute going to arise? With 10013.5, it's really clear how that kind of dispute could arise, because the registrar has that authority to seek injunctions under those statutes. In [Renne] I think the problem was that the lack of such clear enforcement mechanism caused the court to pause and ask, "Well, maybe no one will ever get, maybe this is abstract in the sense that no one will make an endorsement" - -

COURT: Let's make this question a little bit more specific. I think it came up in the context of standing - at least that's what I wanted to hear your comments on - because Geary is now left with only voters expressing an injury. There is no...group out there saying it wants to put in an argument pro or con on a ballot proposition.

SMITH: Yes, there is. Sudi Trippet [and] Election Action submitted ballot arguments, CR 124, CR 42-45.

COURT: Oh, you mean a group - -

SMITH: The group Election Action and Ms. Trippet personally submitted ballot arguments.

COURT: Is this in a declaration or something?

SMITH: The CRs in the 40s is where the city sought

reconsideration of Judge Zirpoli's original ruling in our favor because they wanted to bring a lawsuit under those two statutes to delete material from a number of ballot arguments and they expressly included arguments by Ms. Trippet. CR 124 is basically where we recount what happened in that litigation.

. . . .

COURT: Is this a statement under oath?

SMITH: This was a declaration... And I also refer your honor to CR 124, a much later declaration that explains what happened. And appellees record CR 141.

COURT: What's the bottom line of those declarations?

SMITH: This bottom line is, and this goes back to Judge Rymer's inquiry, that those declarations show that the city filed declarations saying - one was by Michelle Corwin, that's CR 145-147 - "We want to bring a suit. Judge Zirpoli, please reconsider your ruling, for now, because we want to bring a suit to amend a number of ballot arguments". And that included ballot arguments from Ms. Trippet and Election Action. Then the other references are declarations that recount what happened, recount that the City Attorney brought proceedings, and the outcome...In that case, about 1/2 of Ms. Trippet's ballot arguments were allowed and 1/2 weren't.

COURT: That was in connection with the November 1987 election?

SMITH: No, this was June 1988, your honor.

COURT: Can you name a specific incident that is at issue right now out of the 1988 [election]?

SMITH: Yes, Ms. Trippet's ballot arguments.

COURT: And it was rejected or edited?

SMITH: They were heavily edited.

COURT: Are you satisfied with Judge Zirpoli's ruling?

SMITH: No, the part I'm not satisfied with - Judge Zirpoli, I believe, reached a correct ruling on the parts of the statute about "false" and "misleading". But on what I think is the more vague provision, about "inconsistent" material,

he upheld that, and I believe that has greater potential for abuse and unlimited censorship than the other two. Because basically if you went as far as one state court did (in Patterson v. Board of Supervisors, if the standard is you can censor anything [if] it's not clearly relevant to a ballot measure, that is in my view a textbook amorphous non-objective restriction, which the US Supreme Court unanimously agreed in Airport Commission v. Jews for Jesus...that even if it was not a public forum...using a relevancy-based test with no further restriction than just "Is it relevant?", was too vague and ambiguous even in a non-public...And I would cite the court also to...Vanasco v. Schwartz where...the court said "the term 'misrepresentation' could be applied to almost all political speech." In the same decision they talked about vague standards and were concerned about - -

COURT: Just 30 seconds. What is there left of this case that is not moot?

SMITH: I don't think anything is moot. You've got the continuing controversy about whether the registrar can use these statutes to delete material in the voter handbook. This controversy with respect to ballot arguments was so active that, as I showed you before, in 1988, right in the middle of this lawsuit, they went back to district court to get Judge Zirpoli to - -

COURT: So nothing else has happened in the past 5 years?

SMITH: Nothing has happened from the registrar for the past 5 years for a very good reason, your honor. Judge Zirpoli's injunction was in place because this court wouldn't stay it until late 1990.

COURT: Has anything happened since late 1990?

SMITH: There's been private party suits that got to the California Supreme Court. I'm thinking in part of the Drexel case. In San Francisco county, no. And I think it's because of this lawsuit, candidly.

. . . .

COURT:...after we decide on the administrative censorship, it seems to me entirely different from the court proceeding, regardless of the way we decide 10012. We still have to decide, it seems to me, unless it's moot under Renne,

which you say it is not, we have to decide whether the procedures under 10013.5 - going to court and by clear and convincing evidence demonstrate either that its been false or misleading or it's inconsistent because they can, under 10012, indicate their party preference, isn't that issue still alive, or did you jettison that one?

SMITH: I would say that because of Renne it's even more alive than if Renne hadn't been decided, in the sense that under the redressability test, I think they're almost saying that we had to challenge both statutes.

COURT: Is the answer you're still pressing the unconstitutionality of that section before us now?

SMITH: Yes, but I believe if they were to seek a judicial remedy, they couldn't do it under that vague, over-broad statute. They would have to use a regular declaratory relief or regular mandamus procedure.

COURT: Now you've managed, one way or the other, to get me extremely confused. Ten minutes ago you conceded that if we found in the Mark case that the administrative censorship was inappropriate, as Zirpoli found, that we would not, in this case, worry about 10013.5, so far as candidate statements are concerned. However, if I understand the cases correctly, we do have the issue in Renne because you say that the Trippet candidate statement makes it alive, as to whether "false, misleading or inconsistent" is an appropriate constitutional standard for ballot arguments. Did I state that all correctly?

SMITH: Not exactly. You stated correctly the part about Trippet and the ballot argument. But you state incorrectly that I was saying that if you found that administrative censorship was invalid, that you never had to get to 10013.5. That's not correct. What I was saying is you need not reach the merits on candidate statements, specifically the one about partisan preferences...You wouldn't have to reach the merits of that substantively, if you decided it's invalid procedurally.

COURT: Is that because there was never an action brought under 10013.5 in the Mark case. It was done administratively under 10012?.

SMITH: Absolutely, it was all done administratively. It was

done administratively in all the prior examples we cited.

COURT: Then what you're saying is, for Mark - that is, the candidate statement - if we sustain Judge Zirpoli under 10012, then that completes the Mark case?

SMITH: No, it doesn't, because I believe we have listener standing to challenge 10013.5, and we are.

COURT: With that, time allotted is complete.